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FEDERAL CONTROL OF CONFLICT OF LAWS

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Under our federal system of government two sets of laws operate within the country, the laws of the constituent states and the laws of the central government. For lawyers there is the ever present question, which of them applies to a case: the law of a state, to be interpreted finally by the courts of the state; or national law — federal law, as it is usually called — of which the Supreme Court of the United States is the final arbiter?

Interstate and international matters, with which conflict of laws deals, involve national as well as state interests. In the United States it was perceived early that they should not be left to the uncontrolled discretion of the several states, and even the loose Articles of Confederation had a rudimentary full faith and credit clause.[1] It was a major purpose of the Constitution of the United States to give to the nation increased control over these matters.

One of the shortcomings under the Articles of Confederation was that the nation lacked power to enforce its laws directly on the individual citizens, and was under the necessity of appealing to the states to take the desired action. A second shortcoming was that the states could and did discriminate against one another, particularly in trade and commerce. A third was the inadequacy of legal protection accorded the individual against government. These weaknesses were all dealt with by the Constitution either at once or shortly.

The methods of dealing with the shortcomings were two. The first was to create or to make possible national unity through a single federal law where this was needed, and in numerous areas the national government was empowered to make laws which it could enforce directly. The second method was to place limitations upon the powers of the states in areas otherwise left within their control. So the power of a state to discriminate against the citizens and laws of other states was sharply curtailed. Later the power to enact grossly unjust laws was cut down by the Civil War amendments to the Constitution.

These changes have had profound effects on private interstate and international cases. The states of the Union, however, retain their law-making power except as it is modified by or pursuant to the Constitution, and this is true as to conflict of laws.[2]

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1. See Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944).

2. The states retain this power even in international conflict of laws, despite

This article is concerned with the extent to which federal law restrains or has supplanted the state rules of conflict of laws. It will not deal with jurisdiction of courts or the enforcement of sister-state judgments, where federal restraint or direction is understood and accepted. It will confine itself to substantive law, and it will attempt to give only an outline of the extent of federal control.

A SINGLE NATIONAL LAW

In dealing with the old inability of the nation to enforce its laws directly against the citizens, the Constitution made possible a single law for the whole country. This law, as the supremacy clause of Article VI provides, is "the law of the land" and "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, as to some matters there is a truly national law applicable alike in all courts, and as to such matters there can be no state law.

The conclusion as to international affairs was given by Justice Sutherland: "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist."[3] In the interstate field, too, the United States is a unit legally as to all matters covered by federal law. "State lines [and laws] disappear," and with them disappears the possibility of interstate conflict of laws.

Two aspects of the relationship of state law and federal law call for mention here. First, insofar as there is a valid federal law on a subject, there cannot be an opposing state law. Secondly, the principles of conflict of laws do not govern the relationship of state law and federal law to each other. A state court cannot refuse to enforce the rights arising under a federal statute by invoking a doctrine of conflict of laws, as, that the federal statute is against the public policy of the state, or that the statute is a penal law in the conflict of laws sense. In a case involving an asserted conflict between state policy and federal law, the Supreme Court of the United States said: "That policy [of the federal law] is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of that state."[4]

Returning to the effect of a single national law on conflict of laws, it is apparent that federal law of this sort has steadily encroached on

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the argument that international conflicts are a part of the field of foreign affairs reserved wholly to the Federal Government. Clark v. Allen, 331 U.S. 503, 67 Sup. Ct. 1431, 91 L. Ed. 1633 (1947).

3. United States v. Belmont, 301 U.S. 324, 331, 57 Sup. Ct. 758, 81 L. Ed. 1134 (1937).

4. Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 57, 32 Sup. Ct. 169, 56 L. Ed. 327 (1912). See also Testa v. Katt, 330 U.S. 386, 67 Sup. Ct. 122, 91 L. Ed. 613 (1947).

state law and so on the areas of interstate conflict of laws. The Federal Bankruptcy Act is one illustration, supplanting as it did the state bankruptcy acts and ending the old troublesome interstate conflicts problems of priorities and discharge in bankruptcy. The most numerous examples of this expanded control are under the interstate commerce power. Familiar illustrations are the Federal Employers' Liability Act concerning railroad employees,[5] and the Pomerene Act dealing with interstate bills of lading.[6]

The areas covered by federal law have been developed principally through the enactment of detailed statutory provisions. Some matters, however, are regulated by what may properly be called a federal common law — a common law developed by the federal courts in areas from which the state laws have been excluded and in which federal legislation is not specific. This federal common law is not merely a law to be applied by the federal courts, as was the old misnamed "federal common law" under *Swift v. Tyson.*[7] It is a part of "the law of the land" to be applied by all courts, and it correspondingly cuts down the area of interstate conflict of laws.

This is the result, for example, when an area of interstate commerce is brought within the control of a federal statute without an explicit provision on a point later in issue. The effect of such a statute is illustrated by two closely parallel cases concerning penalties imposed on a telegraph company for negligence in the transmission of interstate messages. The first case, *Western Union Telegraph Co. v. Brown,*[8] arose before there was federal legislation regulating interstate telegraph companies. It involved a South Carolina — District of Columbia message which failed of delivery because of negligence on the company's part in the District of Columbia. In an action for a penalty, the state court applied the law of South Carolina, but the Supreme Court of the United States reversed the decision on the ground it should have applied the law of the District of Columbia, where the negligence took place. The second case, *Western Union Telegraph Co. v. Boegli,*[9] arose after the Mann-Elkins Act of 1910.[10] This statute regulated interstate telegraph companies in a broad way; and though it had no provision as to liability for negligence, it was deemed to have taken over the field. The case involved a message sent from Illinois to Indiana, and the state court applied the law of Indiana where the negligence occurred. Again the state court decision was reversed. This time the

5. 35 STAT. 65 (1908), as amended 53 STAT. 1404 (1939), 45 U.S.C.A. §§ 51-60 (1943).
6. 39 STAT. 538 (1916), 49 U.S.C.A. §§ 81-124 (1951).
7. 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842), overruled by Erie Ry. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
8. 234 U.S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457 (1914).
9. 251 U.S. 315, 40 Sup. Ct. 167, 64 L. Ed. 281 (1920).
10. 36 STAT. 539, 544, as amended, 49 U.S.C.A. § 1 *et seq.* (1929).

reversal took place, not because the court had used the law of the wrong state, but because the federal law had supplanted the law of all the states.

Another illustration is the law applicable to some activities of the Federal Government. In a case involving the right of the United States to recover the amount of a check drawn on the Treasurer of the United States, and paid by him when presented with a forged indorsement, it was held that "The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."[11] Such interstate activities, though they may seem to present conflict of laws problems, are now governed by a single federal law.

THE BEARING OF FEDERAL LAW ON CONFLICT OF LAWS

Turning from matters governed by a single federal law, we come to those where state laws apply. This is the principle area of conflict of laws for the American lawyer. Suppose a typical choice of law case. An offer mailed by a man in Ohio is accepted by letter from the offeree in Indiana, and under the terms of the agreement performance is to take place in Illinois. One of the parties fails to perform, and suit is brought in Iowa. What law will be used to determine whether there was a contract?

Two kinds of law must be considered. First, there is the local or internal law of the state, which will be applied to determine the rights of the parties. In the case supposed it would be the law of contracts of Ohio or Indiana or of Illinois. Second, there is the choosing or pointing law, which designates the state whose local or internal law should be applied. This second law belongs, of course, to the field of conflict of laws. Does federal law direct or prohibit or limit the action of a state court in choosing the applicable law, and in enforcing foreign causes of action? In part, at least, the answer is Yes. The full faith and credit clause and the due process clause are the principal provisions bearing on this matter. Other provisions which may be of some importance but which will not be discussed are the privileges and immunities clause, the liberty of contract clause, the interstate commerce clause and the clause giving power to the Federal Government over federal territory.

The question above as to federal law may be put more sharply. Do these constitutional provisions turn all choice of law over to federal law; or do they merely set limits on what the state rules may prescribe?

11. Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 Sup. Ct. 573, 87 L. Ed. 838 (1943). See also Hinderlider v. La Plata Co., 304 U.S. 92, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938) (apportionment of waters of an interstate stream); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 Sup. Ct. 237, 91 L. Ed. 162 (1946) (interest on unpaid interest during reorganization under Bankruptcy Act).

The major considerations for and against the application of the full faith and credit and due process clauses will first be discussed. Next, the situation will be dealt with where the occurrence sued on took place wholly in one state, and suit is brought in another state. Then the more complex case will be taken up where the occurrence took place partly in one state and partly in another, and it is necessary to determine which law shall apply. Finally, some general questions on federal control will be raised.

The control of conflict of laws by federal law is conferred in the most explicit terms by the full faith and credit clause of the United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[12]

The power given by the clause to Congress to "prescribe . . . the effect thereof" was exercised in 1790 as to judgments. The result is that federal law has taken over practically the whole of the field of sister-state judgments.[13] There was no similar provision as to the effect of public acts until 1948, when the statute as to judgments was amended to include "public acts" on the same terms with judgments. The statute now reads:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."[14]

The requirement of full faith and credit to "public acts," *i.e.*, statutes, means full faith and credit to private rights arising from them. The principal purpose of public statutes is to create private rights based on occurrences to which they apply. So, if an occurrence takes place wholly in Illinois, the public acts of Illinois create rights in the parties to the occurrence.[15] If a suit based on the Illinois occurrence is brought in Wisconsin, the Constitution and the federal statute, literally applied, affirmatively direct Wisconsin to give the same credit to the rights under the Illinois law that the State of Illinois itself would do.

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12. U.S. CONST. ART. IV, § 1.
13. See Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COL. L. REV. 153 (1949).
14. 62 STAT. 947 (1948), 28 U.S.C.A. § 1738 (1950).
15. "Exercise of Legislative Jurisdiction. A state exercises legislative jurisdiction through its law which creates interests upon the happening of specified acts or events." RESTATEMENT, CONFLICT OF LAWS § 60 (1934).

The Fourteenth Amendment provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[16]

The Amendment strikes down any grossly unreasonable state law. It strikes down not only such a rule of local law, but also such a rule of conflict of laws. A rule of conflict of laws, for example, would be grossly unreasonable if it directed that the rights under an occurrence be governed by the law of a state which had no substantial connection with the occurrence. The due process clause would strike down such a rule of conflict of laws and would thus give the negative direction that the law of the state pointed to by the unreasonable conflict of laws should not be used.

At times this effect of the due process clause is discussed in terms of "legislative jurisdiction," or, as it is more accurately expressed, substantive law jurisdiction.[17] A state which has no substantial connection with an occurrence is said to lack "legislative jurisdiction" over the occurrence and the parties to it, so its substantive law cannot be used. Judge Learned Hand said:

> "Moreover, it is basic in the whole subject that legislative jurisdiction — of which this is an instance — is territorial, and that no state can create personal obligations against those who are neither physically present within its boundaries, nor resident there, nor bound to it by allegiance."[18]

What is the measure of federal control of choice of law effected through these vague words, "full faith and credit" and "due process"? The answer given by the Supreme Court of the United States has varied from time to time and from field to field. For many years the Supreme Court exercised no control at all. Justice Story, in his treatises on conflict of laws and on the Constitution, written nearly fifty years after the adoption of the full faith and credit clause, scarcely intimated that there is control over the applicable law. As late as 1916 a statement by the Supreme Court seemed to indicate that the Constitution had no application in such cases.[19] Going to the other ex-

16. This Amendment gives to the Congress the power "to enforce, by appropriate legislation, the provisions of this Article." The power has not been exercised in a way which bears on conflict of laws.

17. See note 15 *supra*. This use of "jurisdiction" as indicating a legal power to create substantive rights is to be contrasted with the same word as indicating the legal power to entertain a judicial proceeding.

18. Siegmann v. Meyer, 100 F.2d 367, 368 (2d Cir. 1938). See Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165 (1948).

19. "The most that the plantiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the

treme, the Supreme Court in some cases appeared ready to take over the whole of choice of law by requiring adherence to the rules it deemed advisable.[20] These latter decisions led the American Law Institute in 1934 to reserve the question whether every problem in conflict of laws had become a question of constitutional law.[21]

At the present time the Court seems to be moving cautiously from case to case and from field to field, and seems to refrain from laying down any broad rule. The indefiniteness and uncertainty in these matters has been graphically stated by one of the Justices of the Supreme Court of the United States in a notable address, "Full Faith and Credit, the Lawyer's Clause of the Constitution."[22]

The uncertainty in this area derives from disagreement over the needs of our federal system. In an Illinois-Wisconsin case in which the Supreme Court of the United States was divided in judgment, 5-4, the basic question was thus stated:

> "The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action."[23]

The extension of federal control over conflict of laws might bring substantial advantages. Through the creation of a single conflicts rule for all courts, federal control would help to produce that uniformity in

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cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned." Brandeis, J., in Kryger v. Wilson, 242 U.S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229 (1916).

20. See the fraternal benefit insurance cases and some of the other insurance cases dealt with later in this article.

21. RESTATEMENT, CONFLICT OF LAWS § 43 (1934). See ROSS, *Has the Conflict of Laws Become a Branch of Constitutional Law?* 15 MINN. L. REV. 161 (1931).

22. "A second course [available to the Supreme Court] is that we will adopt no rule, permit a good deal of overlapping and confusion, but interfere now and then, without imparting to the bar any reason by which the one or the other course is to be guided or predicted. This seems to me about where our present decisions leave us." Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1, 27 (1945).

23. Black, J., in Hughes v. Fetter, 341 U.S. 609, 611, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951). In the "more basic conflict," to which Justice Black directs attention, there is on the one hand "the strong unifying principle" enforced through federal control of conflict of laws. The opposing principle, stated on the same high level of governmental policy, is that of diversity or state control which would leave it to each state to determine whether the rights under the laws of another state shall be enforced. Which of these general principles shall prevail, federal control or state control, should depend on the nature of the interests created by the first state and the nature of the local policy asserted by the second state, and on an evaluation of the importance of unity or diversity in the matter in question.

result which is a principal purpose of conflict of laws, and it would thus permit more reliable planning and prediction in interstate cases. It would also prevent the harmful results of state provincialism and jealously, which was a primary purpose of the Constitution. It may well be thought that federal control is particularly appropriate in conflict of laws, which by its nature involves interstate and international matters and not matters of merely local concern.

Uniformity and certainty, however, will be purchased at a price. The price is the destruction or diminution of state power, with the consequent weakening of local self-government. In conflict of laws it may be unwise, or at least premature, to sacrifice state independence and diversity. Conflict of laws is a fairly young subject in the common law, with many of its basic ideas still vague and unformulated. It reaches into every aspect of private law, and the combination and variety of the situations it presents are almost unlimited. This may be the kind of subject where the diversity of state views and the trial and error method in state courts should be maintained.

With this competition of policies, the decision one way or the other on federal control will doubtless vary with the time and with the field. One result is clear. The old, seemingly complete freedom of the state is at least modified. The Supreme Court of the United States has repeatedly stated the conclusion:

> "For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity."[24]

In determining the place and extent of federal control, the nature of the federal union of states is the principal guide, for "Such exception as there may be to this all-inclusive command [of full faith and credit] is one which is implied from the nature of our dual system of government. . . ."[25]

THE ENFORCEMENT OF FOREIGN LEGAL RIGHTS

Suppose an occurrence has taken place in one state, and in a second state an action is brought to enforce the resulting cause of action. The usual course is for the forum to entertain the case and to apply to it the law of the state of the occurrence. There are two other courses, however, which at times have been taken. First, the forum may refuse

24. Brandeis, J., in Broderick v. Rosner, 294 U.S. 629, 642-643, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935). In Milwaukee County v. M. E. White Co., 296 U.S. 268, 276, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935), Stone, J., said: "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right irrespective of the state of its origin."

25. 296 U. S. at 273.

to entertain the case at all, because of the nature of the cause of action. Second, the forum may entertain the case and then apply its own local law to determine the rights of the parties. Does federal law prohibit or limit either of these two courses by the forum?

When a forum refuses to entertain a foreign cause of action, it may give as its reason that it does not enforce a case which is against its public policy, or which is based on a penal law or a tax law. If the suit were brought on a sister-state judgment, the forum could not refuse to entertain the case, as these defenses of public policy, penal law, tax laws, have almost, if not entirely, been done away with by the requirement of full faith and credit to judgments.[26] Does the full faith and credit requirement similarly strike down these defenses when the suit is on a cause of action not reduced to judgment?

The question was presented in *Hughes v. Fetter*.[27] In Illinois there had been a fatal automobile accident and an action was brought in Wisconsin under the Illinois death statute against the alleged wrongdoer and his insurance company. All the parties were of Wisconsin — the deceased, the plaintiff-administrator, the individual defendant and even the insurance company. Though the Wisconsin local law allowed recovery for wrongful death, a Wisconsin statute forbade the enforcement of foreign death claims. Illinois had a similar statute as to foreign death actions. Relying on the Wisconsin statute, the Wisconsin court dismissed the action. The Supreme Court of the United States, by a divided court, reversed the Wisconsin decision. The opinions made explicit several factors to be considered in such a case.

Speaking for the majority of five, Mr. Justice Black first made plain the conflict between the unifying policy of the full faith and credit clause, and the policy in favor of local control. He then stated Wisconsin had no true public policy against death actions since that state had a death act. He added that the Wisconsin statute might have the result of making a claim unenforceable if the tortfeasor could not be subjected to suit in another state,[28] and he emphasized the close relationship of all of the parties to Wisconsin to show that Wisconsin was not an inconvenient forum. He concluded that under the circumstances, "Wisconsin's statutory policy . . . is forbidden by the national policy of the Full Faith and Credit Clause." The decision was expressly rested on

26. See Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COL. L. REV. 153 (1949).

27. 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951). For an appraisal of the case see Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. OF CHI. L. REV. 339 (1952). See also, Note, *State Statutes and the Full Faith and Credit Clause — Hughes v. Fetter*, 5 VAND. L. REV. 203 (1952).

28. In First National Bank of Chicago v. United Air Lines, 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 441 (1952), it was held that Illinois must enforce a Utah cause of action for death, even though the Illinois statute forbidding enforcement of foreign death actions contained an exception where service of process could not be had on the defendant in the state where the death was brought about.

the constitutional provision itself, and the changes which may have been accomplished by the statute under it were not considered.

Speaking for a minority of four, Mr. Justice Frankfurter said that the effect of full faith and credit should vary with the field of law, so "in the field of commercial law — where certainty is of high importance — we have often imposed a rather rigid rule"; but in this kind of tort "the liability . . . does not rest on a preexisting relationship," so there is no need for "fixed rules which would enable parties, at the time they enter into a transaction, to predict its consequences." He then stated that the Wisconsin decision was reasonable because of possible inconveniences in procuring foreign witnesses and in interpreting foreign law and because Illinois had a similar statute. He concluded that Wisconsin's action was constitutional for full faith and credit does not compel the enforcement of a cause of action "where there is a reasonable basis for the forum to close its court to the foreign cause of action."

All of the justices were agreed on two important matters: (1) The full faith and credit clause does have some application to the enforcement of causes of action. (2) The application is not automatic or inclusive of all causes of action, and the determination in each case whether it is coercive involves a choice between competing policies. In the actual case the justices were disagreed on where the weightier policies lay, that is, whether the policy in favor of state control and of the defense upheld by the state court was stronger that the federal policy in favor of enforcement of foreign rights. In this determination, at least three sets of factors have been mentioned. First, the nature of the claim, that is, is it of a kind where certainty and predictability are important? Second, the nature of the defense, and the strength of the local policy involved. Third, the relation of the forum and the parties to the occurrence, for example, if the defendant was domiciled in the forum there is usually more reason for applying the foreign law to protect him.[29]

29. Where the forum state had substantial connections with the occurrence itself, the use of the public policy doctrine has been upheld. Union Trust Co. v. Grosman, 245 U.S. 412, 38 Sup. Ct. 147, 62 L. Ed. 368 (1918). *Cf.* Bothwell v. Buckbee, Mears Co., 275 U.S. 274, 48 Sup. Ct. 124, 72 L. Ed. 277 (1927); Griffin v. McCoach, 313 U.S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941). *But cf.* Bond v. Hume, 243 U.S. 15, 37 Sup. Ct. 366, 61 L. Ed. 565 (1917). There seems to be no Supreme Court decision in which the full faith and credit clause was invoked to challenge a state court's use of the rule that a state will not enforce the penal laws of another state. Nor has the Supreme Court passed on the supposed rule that one state will not enforce the tax laws of another state; though in one case it left the question open, saying, "whether one state must enforce the revenue laws of another remains an open question in this court." Milwaukee County v. M. E. White Co., 296 U.S. 268, 275, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935).

Enforcement of Stockholders' Liability by a Statutory Successor

The area in which the requirement of enforcement of foreign causes of action is most firmly established is the enforcement of stockholders' liability by a statutory successor. Typically the situation is one in which a corporation has been taken over by a liquidator and, in a judicial proceeding with all absent stockholders notified, at least by publication, it has been determined that the corporation is insolvent and that for the protection of creditors it is necessary the stockholders pay the amount of their assessments to the liquidator. In the leading case of *Converse v. Hamilton*[30] the liquidator of a Minnesota corporation brought suit in Wisconsin against Wisconsin stockholders and was denied recovery by the Wisconsin court because of a settled policy of that state. The Supreme Court of the United States held, however, that under the full faith and credit clause the Wisconsin court must enforce the claim.

For a time it was thought that the result in such a case was based on the credit required to judicial proceeding in the first state. But in *Broderick v. Rosner*,[31] where the assessment was made by an administrative officer and not in a judicial proceeding, the Supreme Court held that the same requirement existed, saying of *Converse v. Hamilton*:

> ". . . Wisconsin was required to enforce the Minnesota assessment because statutes are 'public acts' within the meaning of the clause . . . and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation, submitted themselves to that extent, to the jurisdiction and laws of the latter State. Where a State has had jurisdiction of the subject-matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other states."[32]

In these stockholders' liability cases, the reasons for the application of the full faith and credit requirement are particularly strong, for if the liabilities are not enforced the corporate creditors may go unpaid, and the burden on stockholders will be uneven.[33]

The Full Faith and Credit Clause and Legal Interests Other than Causes of Action

The laws of a state are not confined in their effect to the creation of causes of action on which suit may immediately be brought. They serve to create all types of legal rights and relations, such as property

30. 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912).
31. 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935).
32. 294 U.S. at 644.
33. See Abbot, *Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation*, 23 HARV. L. REV. 37 (1909); Note, *Foreign Enforcement of Stockholder Liability*, 36 COL. L. REV. 1108 (1936). *But cf.* Pink v. A.A.A. Hwy. Express, Inc., 314 U.S. 201, 62 Sup. Ct. 241, 86 L. Ed. 152 (1941) (second state found defendants were holders of insurance policies and not members of the association).

rights, family relationships, corporate existence, and so forth. The protection of the full faith and credit clauses may apply to these other rights and relationships. Two illustrations will suffice.

The first concerns the status of a liquidator. Two types of liquidators are the chancery receiver and the statutory successor, the latter having the greater powers, especially in conflict of laws. Suppose a liquidator is created by the laws of one state and then seeks to exercise his powers in another state and, suppose further, the second state erroneously characterizes him as a chancery receiver instead of as a statutory successor. The full faith and credit clause may compel the second state to recognize the liquidator for what he is, a statutory successor and not an equity receiver, and to give him the rights incident to his true status. In *Clark v. Williard*,[34] an Iowa statutory successor sued in a Montana court but was there treated as an equity receiver. The Supreme Court of the United States reversed the decision of the Montana court saying:

> "We think the Supreme Court of Montana denied full faith and credit to the statutes and judicial proceedings of Iowa in holding, as it did, that the petitioner was a receiver deriving title through a judicial proceeding, and not through the charter of its being and the succession there prescribed."[35]

Another illustration involves property rights. In *Green v. Van Buskirk*,[36] a mortgage covering chattels in Illinois had been executed in New York by one resident of that state to another resident. The chattels were attached in Illinois by a creditor of the mortgagor before the mortgage was there recorded, and they were sold to satisfy the attaching creditor's claim. Later the New York mortgagee brought suit in New York against the Illinois attaching creditor for the value of the chattels. The New York court gave judgment for the mortgagee, on the ground that the law of New York and not the law of Illinois should govern the transaction, and under the law of New York the mortgage overreached the subsequent attachment. The Supreme Court of the United States reversed the New York decision and, applying the full faith and credit clause, held that the law of Illinois, the place where the chattels were, must prevail over the law of the domicil of the parties. The court said: "We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the courts of that State, under which it was sold."[37]

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34. 292 U.S. 112, 54 Sup. Ct. 615, 78 L. Ed. 1160 (1934). See also Clark v. Williard, 294 U.S. 211, 55 Sup. Ct. 356, 79 L. Ed. 865 (1935).
35. 292 U.S. at 121.
36. 5 Wall. 307, 18 L. Ed. 599 (1866), 7 Wall. 139, 19 L. Ed. 109 (U.S. 1868).
37. 5 Wall. at 311.

The Application of the Forum's Law to a Foreign Cause of Action: "Procedure" and "Public Policy"

It was pointed out earlier that when a foreign cause of action is sued on, occasionally the forum has entertained the cause of action and, instead of applying the foreign law, has applied the local law of the forum. The use of the forum law is explained in these cases by the conflict of laws rules as to procedure and public policy. These rules, it will be remembered, are matters of procedure and are governed by the law of the forum; and the forum will not enforce a foreign law opposed to its fundamental public policy. Does the Constitution restrict the application of these rules in such a situation?

From the earliest days of the common law, it has been recognized that some aspects of foreign cases are to be governed by the local law of the forum, as when it would be impracticable or seriously inconvenient to use the foreign law. This general principle is not destroyed by the full faith and credit clause.[38] Its grievous misapplication, however, may be prevented. The leading case is *John Hancock Mutual Life Insurance Company v. Yates.*[39] There a policy of life insurance issued in New York to a resident of that state was invalid under a New York statute, because of misrepresentations in the application. The beneficiary brought suit in Georgia where such misrepresentations would invalidate the policy if they were material, but the question of materiality would be left to the jury. The Georgia court determined that the respective functions of judge and jury in the case were a matter of procedure, and that the question of materiality of the misrepresentations was properly left to the jury which gave a verdict for the plaintiff. The Supreme Court of the United States held that the decision denied full faith and credit to the New York statute, saying: "No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York."[40] So the assertion by the forum that a particular aspect of a case is a matter of procedure or remedy to be governed by the law of the forum is not conclusive. The classification is subject to review, and a seriously erroneous classification by the forum may be a violation of the Constitution.

In a few cases the forum has put aside the foreign law and used its own law to strike down a good defense on the ground the defense was opposed to the public policy of the forum. The use of "public policy" for such a purpose, it should be noted, is markedly different from its use discussed earlier in the section. There public policy is used as a ground for the refusal by the forum to entertain the case; and when so

38. See Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586, 607, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947).
39. 299 U.S. 178, 57 Sup. Ct. 129, 81 L. Ed. 106 (1936).
40. 299 U.S. at 178.

employed it should leave the plaintiff, the party against whom the public policy doctrine is invoked, free to proceed with his claim elsewhere. But here, public policy is invoked in a more decisive way, to strike down and destroy a defense as a prelude to a final judgment on the merits against the defendant. This may not be done where the defense was good under the law of the occurrence and the forum had no substantial connection with the occurrence.[41] The conclusion stated succinctly is:

> ". . . to refuse to give effect to a substantive *defense*, arising under a contract valid where made and to be performed, would violate the principles of due process, even though the local courts might lawfully refuse to affirmatively enforce the contract."[42]

Conclusion

Some conclusions seem justified. (1) The full faith and credit clause applies to the protection of sister-state causes of action and their enforcement. It applies as well to the protection of other legal interests, for example, defenses, property rights and the nature of a liquidator. (2) It does not require the enforcement of all such causes of action. (3) In determining whether the constitutional requirement is operative in a particular case, weight must be given to the competing policies of our federal system. (4) The effect of the 1948 Amendment to the statute enacted under the full faith and credit statute in broadening the scope of the full faith and credit requirement is undetermined.

THE CHOICE OF THE APPLICABLE LAW[43]

When an occurrence sued on had elements in two or more states, as when an offer to a contract is made in one state and is accepted in a second and performance is to be rendered in a third, a choice of the applicable law must be made. Does federal law control or restrict the

41. Home Ins. Co. v. Dick, 281 U.S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926 (1930).
42. Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145, 147 (S.D. Fla. 1944).
43. Federal control of the applicable law has been considered in several careful law review articles. See Dean, *The Conflict of Conflict of Laws*, 3 STAN. L. REV. 388 (1951); Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Harper, *The Supreme Court and the Conflict of Laws*, 47 COL. L. REV. 883 (1947); Hilpert and Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U.L.Q. 27 (1939); Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1 (1945); Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 ILL. L. REV. 383 (1929); Moore and Oglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557 (1943); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 ORE. L. REV. 109 (1943); Ross, *"Full Faith and Credit" in a Federal System*, 20 MINN. L. REV. 140 (1936); Smith, *The Constitution and the Conflict of Laws*, 27 GEO. L.J. 536 (1939); Note, *A Factual Approach to the Constitutional Law Aspects of the Conflict of Laws: The Alaska Packers Case*, 35 COL. L. REV. 751 (1935). See also Briggs, *The Jurisdiction — Choice-of-Law Relation in Conflict Rules*, 61 HARV. L. REV. 1165 (1948).

choice of law? This is the most difficult question in federal control of conflict of laws. To find the answer the decisions of the Supreme Court of the United States on three types of situations will be considered. They will suffice, it is believed, to indicate the developments in the field. The situations are fraternal insurance, ordinary insurance and property.

Fraternal Insurance Certificates

In several cases a fraternal insurance association incorporated in one state has issued a certificate of insurance in another state to a resident of the latter state. A provision of the association's constitution and by-laws, perhaps added by a later amendment, was valid under the law of the home state of the association but was invalid under the law of the second state where the certificate was issued and the beneficiary resided. The beneficiary claimed that his rights should be determined by the law of his state where the certificate was issued. In these cases the Supreme Court of the United States has held that the use of the law of the home state is compelled by the full faith and credit clause. Justice Holmes, speaking for the whole court, said:

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law. . . . The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation."[44]

The earlier decisions in these cases had been by a unanimous court. They seemed to establish the rule that in fraternal insurance matters there is the special requirement that the law of the home state be used.[45] But in a decision in 1947 involving fraternal insurance, *Order of United Commercial Travelers of America v. Wolfe*,[46] the court was

44. Modern Woodmen of America v. Mixer, 267 U.S. 544, 551, 45 Sup. Ct. 389, 69 L. Ed. 783 (1925).

45. Sovereign Camp, Woodmen of World v. Bolin, 305 U.S. 66, 59 Sup. Ct. 35, 83 L. Ed. 45 (1938) (certificate paid up); Modern Woodmen of America v. Mixer, 267 U.S. 544, 45 Sup. Ct. 389, 69 L. Ed. 783 (1925) (effect of disappearance of insured); Hartford Life Ins. Co. v. Barber, 245 U.S. 146, 38 Sup. Ct. 54, 62 L. Ed. 208 (1917) (assessment); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165 (1915) (assessment); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089 (1915) (increased assessment). Some writers have thought that these cases could be explained as full faith and credit to judicial proceedings instead of to the substantive law of the home state. It is true that in some of the cases the validity of the association's action had been upheld in earlier class suits or other proceedings in the home state, and there were passages in the opinions of the Supreme Court referring to these earlier judicial proceedings. The clear import of the cases, however, seems to be full faith and credit to the substantive law of the home state. See Note, *Full Faith and Credit: Preferential Treatment of Fraternal Insurers*, 57 YALE L.J. 139 (1947). The cases are carefully analyzed in CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS § 28 (1942).

46. 331 U.S. 586, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947).

divided five to four. The majority "on the basis of evaluated public policy" continued to treat "the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation."[47] The minority, speaking through Mr. Justice Black, categorically denied "that fraternal insurance companies are entitled to unique constitutional protection."[48] They explained the earlier cases as involving, for the most part, assessments on members of corporations and as being controlled by the peculiar need for a single law in such a matter,[49] and they agreed the law of the home state must govern all assessment obligations including those of stockholders of commercial corporations.[50] The *Commercial Travelers* case, however, involved merely the petty requirement in the constitution of the association that action on a claim must be brought within six months after disallowance of it by the association, a matter on which the minority believed a claimant might be given the protection of his home state's law as to the validity of the requirement without serious effect on the solvency of the association.

With the Supreme Court of the United States so divided in opinion, it is uncertain to what extent the supposed old special rule as to fraternal insurance companies will be followed.

Ordinary Insurance Contracts

In insurance contracts other than those of fraternal insurance, there seems to have been no decision that the full faith and credit clause compels the use of the law of the home state of the company. The constitutional provision principally discussed in the cases has been the due process clause. The decisions of the Supreme Court of the United States have turned on whether the justices believed that the Constitution imposes a strict rule of control with one designated law required; or a looser control with the states left free to choose the law within the limits of reasonableness. Two cases involved policy loan contracts with a Missouri insured borrowing from a New York insurance company. The two cases were almost identical in their facts, differing, as the Supreme Court found, however, in the place where the last act in the completion of the loan contract was done. In one, the

47. 331 U.S. at 624.
48. *Id.* at 637.
49. Most of the earlier cases, collected in note 45 *supra*, involved the validity of assessments, which were fundamental to the financial structure of the association. At that time many of the fraternal associations had an unsound actuarial basis and were inadequately supervised in some states. Unless there could be uniformity in the collection of the assessments found necessary by the home state, the associations would be pulled to pieces through preferential treatment of the claims of members in states with looser requirements.
50. The opinion of Justice Black cites the earlier decisions involving the enforcement of the liability of corporate stockholders. See notes 30-32 *supra*.

Dodge case,[51] the Court found that the last act was done in New York where the loan contract was "made," and so the majority of the Court held the due process clause forbade the application of the Missouri law to the loan contract. In the other, the *Liebing* case,[52] the Court found that the last act was done in Missouri, and so the Missouri law could be applied, the opinion of the Court asserting a unique control in the place of making:

> ". . . although the circumstances may present some temptation to seek a different one by ingenuity, the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."[53]

These two cases seemed to indicate a rule of very strict control, requiring the use of the law of the place where the contract was made.[54]

The other view, however, has been strongly asserted that the constitutional control in this area is loose and limited, leaving the states a wide area of freedom in choice of law. This latter view is the one which seems to prevail at the present time. In the *Dodge* case[55] there was a strong dissent in which Justice Brandeis, speaking for a minority of four justices, urged that the same test of reasonableness should be applied to this matter as to other matters where due process was invoked:

> "The test of constitutionality to be applied here is that commonly applied when the validity of a statute limiting the right of contract is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end legitimate? Are the means appropriate to the end sought to be obtained? If so, the act must be sustained, unless the court is satisfied that it is clearly an arbitrary and unnecessary interference with the right of the individual to his personal liberty."[56]

Hoopeston Canning Company v. Cullen[57] involved the effort of Illinois reciprocal insurance associations to insure New York property against fire and related risks without qualifying under the New York law to do business in New York; but the question was treated exactly as if it involved the power of New York to apply its law to regulate the insurance contracts. The formalities of the insurance contracts were centered in Illinois in the sense that the applications were accepted in that state and, apparently, the insurance proceeds were there pay-

51. New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918).
52. Mutual Life Ins. Co. of N.Y. v. Liebing, 259 U.S. 209, 42 Sup. Ct. 467, 66 L. Ed. 900 (1922).
53. 259 U.S. at 214.
54. Other cases indicating strict control are Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 Sup. Ct. 634, 78 L. Ed. 1178 (1934); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 45 Sup. Ct. 129, 69 L. Ed. 342 (1924).
55. New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918).
56. 246 U.S. at 382.
57. 318 U.S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777 (1943).

able. The court, however, declined to be controlled "by conceptualistic discussion of theories of the place of contracting or of performance."[58] It examined in detail the business aspects of the situation in New York which included the location of the insured property, and the investigation of the risks by the company's representative before the policy was issued, during the life of the policy and after a loss had been incurred. It stated that "these business transactions neither begin nor end with the contract"[59] and in holding that the New York law could apply the Court said:

> "We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, . . . of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight."[60]

Workmen's Compensation

The relationship of the due process and full faith and credit clauses to each other has been presented in two workmen's compensation cases. The facts, in general, were that a workman hired in one state was injured in a second state, and when relief was sought under the law of one of the states, objection was made this was forbidden by the due process clause, or by the requirement of full faith and credit to the law of the other state.

In *Alaska Packers Association v. Industrial Accident Commission*,[61] a canning company with its plant in Alaska had the practice of hiring in California Mexicans who came there for employment, transporting them to Alaska for the canning season and then returning them to California. A workman who had been injured in Alaska and had returned to California filed a claim under the workmen's compensation law of California. He was met by the twin defenses of due process and full faith and credit. In upholding the application of the California law to the Alaska injury, Justice Stone's opinion stressed, not the technical conflict of laws contacts, but sociological considerations of threatened poverty and public support, saying:

58. 318 U.S. at 316.
59. *Id.* at 318.
60. *Id.* at 319. Several cases have involved the power of a state to require that insurance on risks or persons within it shall be issued only by insurance companies registered in the state or through local agents. In these cases emphasis has usually been placed upon the powers of a state to regulate insurance strictly and to impose terms on the doing of business by a foreign corporation. Two leading early cases, Allgeyer v. Louisiana, 165 U.S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832 (1897), and Hooper v. California, 155 U.S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (1895), reached opposite results. The rather numerous insurance decisions have been discussed in the law review articles cited at note 43 *supra*.
61. 294 U.S. 532, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935). The opinion explained away the earlier case of Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 Sup. Ct. 571, 76 L. Ed. 1026 (1932).

> ". . . the probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state.
> "California, therefore, had a legitimate public interest. . . .[62]

Turning to the full faith and credit objection, the opinion pointed out "the necessity of some accommodation of the conflicting interests of the two states"[63] and used the test of "governmental interests" in making the adjustment:

> ". . . the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. . . .
>
> ". . . only if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state."[64]

The second case, *Pacific Employees Insurance Company v. Industrial Accident Commission*,[65] involved a chemist who had been employed in Massachusetts and, though working most of the time in that state, was injured in California while working briefly there. He sought relief in California under its law, and again due process and full faith and credit were set up as defenses. This time, it will be observed, the employer was claiming that the Constitution requires the exclusive use of the law of the place where the employment contract was entered into, as against the law of the place where the injury was suffered; while in the *Alaska Packers* case the constitutional contention was that the law of the place of injury must be used. In the present case again, both constitutional objections were rejected. As to the due process clause, the Court said the power of a state to give relief under its law for injury to an employee occurring within its borders is not open to question.

As to full faith and credit, the Court stated:

> ". . . the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. . . .

62. Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 542, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935).
63. 294 U.S. at 547.
64. *Id.* at 548.
65. 306 U.S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939).

> ". . . the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."[66]

On the relationship of the two clauses of the Constitution to each other, these opinions seem clearly to state that if one state has such a relation to the occurrence that its law may constitutionally be applied under the due process clause, the full faith and credit clause does not require that state to apply the law of a second state. Each state can constitutionally use either its own law or the law of the other state.

SOME GENERAL QUESTIONS ON FEDERAL CONTROL OF CONFLICT OF LAWS

After this review of some of the cases, the attempt will be made to answer some general questions on federal control of choice of law. The questions here dealt with are: 1. Is there federal control of choice of law? 2. What is the measure or degree of federal control? 3. What are the factors to be considered in the application of federal control? 4. What is the effect of the nature of the state law involved: statute or common law or administrative regulation? 5. Can there be review of an error in the interpretation of the local law of another state?

Is There Federal Control of Choice of Law?

The answer to this question is clearly, yes. There is federal control of choice of law in conflict of laws, at least to some extent. The control now finds its principal sources in the full faith and credit clause and the due process clause of the Constitution. The measure of control could be fixed by federal statute.[67] It has not yet been determined whether the 1948 Amendment to the full faith and credit statute, which included "public acts" along with "records and judicial proceedings" in the statute, has sharpened or broadened the scope of federal control.[68] There is no such statute under the due process clause.

The Measure or Degree of Federal Control

Does federal control give precise directions on the law to be used? If so, then the doctrines of conflict of laws, as the Supreme Court of the United States conceives them to be, are written into the Constitution of the United States and into the full faith and credit statute, and

66. 306 U.S. at 501.

67. The language of the two clauses of the Constitution give to the Congress the power to pass appropriate legislation to effectuate their purpose. See Stone, J., in Yarborough, v. Yarborough, 290 U.S. 202, 215 n.2, 54 Sup. Ct. 181, 78 L. Ed. 269 (1933) (dissenting opinion); Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919).

68. The statute is quoted at note 14 *supra*.

there is no freedom of choice of law left to the states. At the present time this seems to be the case as to fraternal insurance contracts.[69] As to other matters, the control by the Constitution itself is now loose rather than strict, merely holding the choice of law within the range of reasonableness. The extent of the control probably varies somewhat with the field and with the requirements indicated by the nature of our federal system for the particular field. So commercial law may be treated differently from death actions, and fraternal insurance differently from ordinary insurance.

In determining what is permissible under the due process clause, a notable dissenting opinion stated that "the test of constitutionality to be applied here is that commonly applied. . . ."[70] — that is to say, the test of reasonableness. This statement that the test of due process applied in local law cases is the same as that applied in conflict of laws cases can be accepted only with reservations. Even if the test is verbally the same in the two situations, its application and content may well be different because of the difference in the subject matter. It is one thing when the case in question is wholly local and the state regulation questioned affects only local matters. It is quite another thing when the case is interstate in character and the controversy concerns which of two states should apply its law. In the interstate case, it is quite in accord with the purpose of our federal system that there should be more restraint and more federal control on state action.

Factors To Be Considered in the Application of Federal Control

The power of a state to apply its law to a case rests on the connections or contacts which the state had with the occurrence in question. The connections or contacts which have been employed in determining the power of the state are of two principal kinds. One set is made up of the connections which are employed in the usual conflict of laws rules and which may have been refined into a somewhat artificial form. They include domicil, place of making of a contract, place of a tort, and so forth.[71] The other set, which fortunately have been emphasized in the later cases, are the substantial rather than the technical connections of a state with the occurrence. They include the sociological factors, as the probability that, unless a state's law can be applied to give an injured workman relief, the workman may be remediless in fact and the state may have to support him.[72] They include as well the business and economic factors, as the elements of a business transaction

69. See notes 44-45 *supra.*

70. Brandeis, J., in New York Life Ins. Co. v. Dodge, 246 U.S. 357, 382, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918).

71. See New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918).

72. See Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935).

from the inception of the negotiations to final consummation — elements which may precede or may follow the formal elements of the making of a contract.[73]

In appraising the various factors and in determining the limits of federal control, the guide is the nature and needs of our federal system. And, as the Supreme Court of the United States has repeatedly said in various ways, "Of that question this Court is the final arbiter."[74]

Effect of the Nature of the State Local Law Involved: Statutes or Common Law or Administrative Regulations

Does federal control extend to all types of local law applied in a conflict of laws case — statutes, common law and administrative regulations? The question is given point because the full faith and credit clause does not apply specifically to common law or to administrative law but only to *"public acts, records and judicial proceedings,"* and the Fourteenth Amendment has been held to be no protection against ordinary errors in common law decisions by the state courts. Does this mean that in conflict of laws federal control over seriously unreasonable action by a state court is limited to statutory matters? It should not be so limited but should extend as well to common law and administrative regulations.

It would be a serious breach in our constitutional system if the protection given in interstate matters were wholly dependent on the formal nature of the state law involved — statute or common law. A few states, such as California and Georgia, have codes which assume to include in statutory form all the substantive law, including the principles derived from the common law. Most states lack these all-embracing substantive law codes. It would be an anomaly if because of the accident of the codes the parties in a case involving California or Georgia law were to receive different treatment from that accorded the parties in a precisely parallel case involving Massachusetts or Alabama law.

At least two methods of bringing state common law within the protection of the full faith and credit clause have been urged. The first method would include common law under the phrase "judicial proceedings" in the Constitution for, it is argued, judicial proceedings include not only the judgment of the court but the principles of law on which the judgment rested or should have rested.[75] The second method would include common law under "public acts." The common law, so it is

73. See Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777 (1943).

74. Milwaukee County v. M. E. White Co., 296 U.S. 268, 274, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935).

75. See, Schofield, *The Supreme Court of the United States and the Enforcement of State Law by State Courts*, 3 ILL. L. REV. 195 (1908).

urged, has a statutory foundation in nearly all the states, since its use rests on reception statutes of the states prescribing that the English common law as it was of a certain date shall be a part of the law of the state. In a case under the full faith and credit clause, involving the asserted extraterritorial effect of a state statute, it was sought to distinguish an earlier decision involving the law of a territory on the ground the decision involved a common law liability and not a statutory cause of action. It was said, however, "that distinction marks no difference between the two cases . . ." because in the earlier case there had been a territorial statute adopting the common law.[76] If this view of the effect of the state reception statutes be applied generally, then there is no difference in most states between statute law and common law so far as the full faith and credit clause is concerned, and it applies alike to both. There is a categorical statement by the Supreme Court of the United States that common law is within the protection of the clause.[77]

As to the due process clause, there have been decisions in other fields than conflict of laws that court action is state action for purposes of federal control and that the fact the court decision was based on common law did not prevent the application of the constitutional provision.[78] It may be that there will be a similar application of the due process clause to conflict of laws decisions involving only state common law.

What of administrative action? As to some kinds of administrative action, the answer is clear. If it is an award in a judicial proceeding, it comes within the full faith and credit clause.[79] If it is an executive determination by an administrative officer, it seems equally clear that it comes within the clause of the Constitution. It was so held when an administrative official had made a finding that a state bank was insolvent, and it was necessary to enforce the double liability of the stockholders.[80] There seems to be no decision on the point as to administrative regulations. They should be included under "public acts," and the analogies so indicate.[81]

76. Tennessee Coal, Iron & R.R. v. George, 233 U.S. 354, 361, 34 Sup. Ct. 587, 58 L. Ed. 997 (1914).

77. See Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 436, 64 Sup. Ct. 208, 88 L. Ed. 149 (1943), referring to "the faith and credit . . . to which local *common* and statutory law is entitled under the Constitution and laws of the United States." (Italics added).

78. See Scott v. McNeal, 154 U.S. 34, 45, 14 Sup. Ct. 1108, 38 L. Ed. 896 (1894); *cf.* Shelley v. Kraemer, 334 U.S. 1, 14-18, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948).

79. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 Sup. Ct. 208, 88 L. Ed. 149 (1943).

80. Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935).

81. The rules laid down by a federal administrative body, the Interstate Commerce Commission, as to bills of lading "have the force of federal law and questions as to their meaning arise under the laws and Constitution of the United States." Illinois Steel Co. v. Baltimore & O.R.R., 320 U.S. 509, 511, 64 Sup. Ct. 322, 88 L. Ed. 259 (1944). See Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461, 524 (1937).

Review of an Error in the Interpretation of the Local Law of Another State

A court may use the right rule of conflict of laws and refer to another state for the governing law, but it may happen to make an error in the interpretation of the local law of the state referred to. Is such an error of interpretation one which may be reviewed by the Supreme Court of the United States?

The most recent decisions bear only indirectly on the question. They involve judgments which were denied enforcement because of supposed features of the local law of the state of rendition of the judgments. In one case, a Texas court refused to enforce a California decree because it interpreted the California law as denying competence to the California court.[82] In another case, a Tennessee court refused to enforce a North Carolina alimony decree on the ground that under the North Carolina statute the decree was not a final one.[83] In both cases the Supreme Court of the United States re-examined for itself the law of the state rendering the judgment and found that the interpretation given by the second state was erroneous. Accordingly, it reversed the judgments of the Texas and Tennessee courts on the ground full faith and credit had been denied to the judgments sued on, saying in one case: "Since the existence of the federal right turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here."[84] These cases make it clear that there may be a re-examination of the interpretation given to the law of the first state by the court of the second state. The scope and conditions of the review, however, are not so clear. Will there be fresh examination in every case; or will the Supreme Court of the United States substitute its interpretation for that of the state court appealed from only if it believes that the interpretation was unreasonable, or was uncandid[85] or was not made after a full examination of the question? In both of the cases discussed above, it was stated that the re-examination of the foreign law would be made "with deference" to the opinion of the court appealed from. Yet in each case it was stressed that the determination of the foreign law could be made as well by the Supreme Court of the United States as by the state court from which the appeal was taken.

Turning from judgments to causes of action, the cases involving credit to sister-state laws were decided years ago when the application of the full faith and credit clause to "public acts" was not so clearly established as it is today. A typical case is *Johnson v. New York Life*

82. Adam v. Saenger, 303 U.S. 59, 58 Sup. Ct. 454, 82 L. Ed. 649 (1938).
83. Barber v. Barber, 323 U.S. 77, 65 Sup. Ct. 137, 89 L. Ed. 82 (1944).
84. Adam v. Saenger, 303 U.S. 59, 70, 58 Sup. Ct. 454, 82 L. Ed. 649 (1938).
85. See Holmes, J., in Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96, 37 Sup. Ct. 344, 61 L. Ed. 610 (1917).

Insurance Company,[86] where action was brought in Iowa on a policy of life insurance which, it was assumed, was governed by the law of New York. The insured had failed to keep up the premiums, and there were New York statutes dealing with the effect of such a failure on the life of the policy. The insurance company contended under the New York statutes, properly interpreted, the policy had terminated and that a contrary interpretation by the Iowa court denied full faith and credit to the New York statutes. The Supreme Court of the United States declined to reverse the Iowa decision, saying:

> "The Supreme Court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully considered, and the decisions of the state courts of New York were called to its attention and cited in its opinion. . . ."
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> "The case turned upon its construction. This was not a Federal question."[87]

This language, that error in interpretation is not a violation of full faith and credit, has been repeated in several other cases, though at times in a qualified form, as, "a decision of that question is not necessarily of a Federal character,"[88] or "something more than an error of construction is necessary. . . ."[89] Yet after using such language, the Supreme Court of the United States has gone on in some cases to examine the construction of the state statute for itself, and has then affirmed the judgment.[90]

The language and, perhaps, the action in these early cases as to "public acts," is in marked contrast to the language and action as to the re-examination of state law when judgments are involved. Will the later cases, as to judgments, now be followed in cases involving ordinary causes of action? Full faith and credit applies alike to "public acts" and to "judicial proceedings." Two differences, however, may be noted. The protection given to judgments was recognized and enforced earlier and is now much more complete and detailed than the protection to sister-state causes of action. So it is natural that the fuller protection through careful re-examination of the first state's law should be developed earlier as to judgments. Again, in the ordinary cause of action, the task of re-examining the applicable state law would undoubtedly place a greater burden upon the Supreme Court. Rarely in the field of judgments does enforcement turn upon the interpretation

86. 187 U.S. 491, 23 Sup. Ct. 194, 47 L. Ed. 273 (1903).
87. 187 U.S. at 496.
88. Finney v. Guy, 189 U.S. 335, 340, 23 Sup. Ct. 558, 47 L. Ed. 839 (1903).
89. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96, 37 Sup. Ct. 344, 61 L. Ed. 610 (1917).
90. Smithsonian Institution v. St. John, 214 U.S. 19, 29 Sup. Ct. 601, 53 L. Ed. 892 (1909); Finney v. Guy, 189 U.S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839 (1903); Eastern Bldg. & Loan Ass'n v. Williamson, 189 U.S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735 (1903).

of the law of the first state. But the cases in which a cause of action arose in one state and was sued on in another are very numerous, and a large proportion of them may turn on the interpretation of the first state's law. The Supreme Court is aware of this threatened burden, as its language in a case in which it declined the review shows: "To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another State had been construed to his detriment."[91] For this latter reason, the measure of review in cases of enforcement of causes of action may well be more limited.[92]

91. Johnson v. New York Life Ins. Co., 187 U.S. 491, 496, 23 Sup. Ct. 194, 47 L. Ed. 273 (1903).

92. There is a dictum that if the choice of law rule applied by a state court is a federal rule, on appeal the Supreme Court of the United States would "be under the duty of making an independent investigation . . . ." of the local law of the state referred to. McKenzie v. Irving Trust Co., 323 U.S. 365, 371, n.2, 65 Sup. Ct. 405, 89 L. Ed. 305 (1945).